No. 15141.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

Counsel for appellant has found three typographical errors in the printed Appellant's Opening Brief which the Court is requested to have corrected, to-wit:

On page 15 the text as printed reads:

> "We, therefore, submit that the evidence points to no other rational conclusion that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

There should have been inserted therein between the word "conclusion" and the word "that" the word "then" so that as corrected the text should read:

> "We, therefore, submit that the evidence points to no other rational conclusion than that the air shock waves produced by the atomic explosions were a proximate cause of the resulting damage to Appellant's property."

On page 17 the first line as printed reads:

> "At we have already shown, appellee has made no rational explanation which would absolve it from negligence."

The word "At" should have been "as" so that as amended the text should read:

> "As we have already shown, appellee has made no rational explanation which would absolve it from negligence."

On page 12, at the beginning of the second paragraph the word "Appellant" should be "Appellee."

Appellee has served a 74-page brief, much of which relates to and discusses the activities at *planning level* which were not put in issue at the trial [R. 174-175] nor in our Opening Brief (App. Br. 21). The principal arguments in the Government's Brief which seem to merit comment and reply in addition to the material contained in our Opening Brief are the following:

1. Did the testimony of the witness, Bruner, produce substantial evidence to support the trial court's finding as to negligence (Gov. Br. 2, 17, 59-65)?

2. Does the *Jesionowski* case support the trial court's determination that the doctrine of *res ipsa loquitur* did not apply?

3. Is the interpretation of the discretionary function exemption (28 U. S. C. 2680 (a)) by the most recent circuit court's decisions which are cited in our Opening Brief (App. Br. 18-21) erroneous and contrary to *Dalehite* (Gov. Br. 53-57).

Summary of Reply Argument.

We will demonstrate in the next few pages of this Reply Brief:

1. That the Bruner testimony together with his drawing [Ex. F] did not constitute *substantial evidence* which would support the trial court's Finding XV; that the trial court did not in fact find either expressly or indirectly that the testimony of Bruner was true and accepted by it and that the contrary testimony of the appellant's witnesses was untrue; that the evidence of Bruner was entirely opinion evidence which, as a matter of law, could not be better than the facts upon which it was based and that since the witness admitted that he never saw the property until approximately five months after the buildings were shaken by the atomic explosions and the evidence of three of appellant's witnesses as to the physical facts existing at the time of the explosions were *undisputed,* Bruner's *opinion contrary to such facts is not substantial evidence* and must be disregarded. Lastly, that, since Bruner's testimony was by deposition, the presumption in support of the court's findings based upon the *conflicting substantial evidence rule* does not apply and this court may, itself, determine that such finding is clearly erroneous.

2. That the rationale of the *Jesionowski* case, when applied to the record here, demonstrates and supports our contention that the trial court committed reversible error in refusing to apply of the doctrine of *res ipsa loquitur.*

3. That *Dalehite* is clearly distinguishable from the facts in this case; that the interpretation of the discretionary function exemption set forth on pages 18-21 of our Opening Brief has been joined by the Sixth Circuit in a later decision and that, as applied to the facts here, such interpretations are correct and should be applied in this cause.

ARGUMENT.

1. The Testimony of the Witness, Bruner, Did Not Constitute Substantial Evidence to Support the Trial Court's Finding as to Negligence.

Preliminarily, the attorney who prepared the Opening Brief and is preparing this brief is concerned with the fact that no reference was made to the Bruner testimony in the Opening Brief. In fact, we had completely overlooked and forgotten such testimony while engaged in the preparation of such brief. Upon re-examining the trial court's memorandum of decision [R. 17-23] its Findings of Fact and Conclusions of Law [R. 23-30] we note that no reference was made to and no finding was made upon the purported conflict of the testimony of Bruner [R. 308-337] and the testimony of appellant's witnesses, Arthur J. Seale [R. 56, 58, 60], Chrystal B. Seale [R. 66, 68, 69] and Norwood [R. 130-136] which is referred to on page 64 of the Government's brief. We also have re-examined the voluminous briefs which were filed with the trial court and find that in no part thereof was there any reference made to or any reliance by Government Counsel upon the Bruner testimony. We mention this solely in explanation of the omission to refer to it in the Opening Brief.

It was conceded at the trial that Mr. Bruner was a qualified expert with the reservation that appellant objected to his qualification to testify as to the specific character of the construction or as to the condition of the improvements at the time when the atomic explosions occurred [R. 314]. The conclusive factor with regard to the Bruner testimony is that it did not rise to the status of *substantial evidence* for the reason that it was ex-

clusively opinion evidence which was directly contrary to undisputed physical factual evidence. Succinctly summarized the witness Bruner testified:

That settlement takes place commencing with the construction and continuously thereafter and that such settlement and the expansion and contraction caused by extreme temperature changes produced the cracks which he observed in the buildings which are involved in this litigation [R. 319-320]; that the cracks which he saw in the plaster walls and ceilings of these buildings *during April, 1952*, were both new and *old* [R. 324] and that it was his opinion that these cracks were the results of temperature changes [R. 327]; that the plaster was cracked and patched before these buildings were finished [R. 328] although he admitted that his only information was that these buildings were completed about 10 years before the date when he first saw the property [R. 323]. He referred to a drawing, which he had prepared, which was marked as Defendant's Exhibit A for identification and was so referred to in his deposition [R. 318, 320, 325 and 338]; which was later received in evidence as Defendant's Exhibit F [R. 338] and is before this court as an original exhibit. While he stated that such drawing "is typical of the construction in the Bartholomae ranch" [R. 320] in other portions of his testimony he admitted that he could not detect whether or not the plaster was fibered [R. 320, 323]; that he did not tear out any sections to learn about the construction [R. 322]; that he did not see the plans and specifications [R. 322] and that his drawing *might or might not* represent the type and character of the construction of the Bartholomae buildings [R. 325]. Furthermore, since the writing is before this court, it can de-

termine from an inspection thereof whether or not such drawing discloses any scale, or the depth of the footings in the ground, or the width of the foundations, or the type of concrete mix, or the size of the floor joists, or the type of roof, or the type of flooring or its size, or the size of the joists; whether there was roof bracing, or the type of insulation, ventilation or the numerous other factors which this court would judicially know to be a necessary and elementary part of an illustration of "typical construction": and which deficiences are pointed out by the witness Norwood [R. 339].

The basic deficiency in the Bruner testimony which prevents it from reaching the status of "substantial evidence" is the express admission of the witness that he had never been to the property before April, 1952:

> "Q. Had you ever been to this ranch before your trip, in April, 1952? A. No, sir [R. 324]."

Taken together with the *undisputed physical evidence testimony* of the Seales and the witness Norwood [Arthur J. Seale—R. 56, 58, 60; Chrystal B. Seale—R. 66, 68-69; Norwood—R. 130-132]; the photographs taken by Mr. Millard and the charts showing the character, length and directions of the cracks [Exs. 5, 10-25 incl.]. In the light of these physical facts (which directly controvert the opinion of the witness Bruner) that there *were no cracks* up to the time of the atomic explosions with which we are here concerned, the opinion that cracks had taken place prior thereto must fall and does not constitute *substantial evidence.* This court has so held in *State of Washington v. United States,* 214 F. 2d 33, at pages 41 and 43.

In addition to the foregoing, this court will recognize that the testimony of appellant's witnesses, Mr. and Mrs. Seale, and the testimony of the Government's witness, Bruner, was entirely by deposition. Thus, this court, itself, may and should weigh the testimony without the aid of any presumption favoring the decision of the trial court upon the issues presented by such testimony:

> "The findings in the court below are made upon evidence which had been taken before an examiner and not in open court and they are not attended with presumptions in favor of findings which are made on conflicting testimony where the trial judge has the opportunity to observe the demeanor of the witnesses." *United States v. Booth-Kelly Lumber Co.* (C. A. 9), 203 Fed. 423, 429.

> "All the testimony upon the issue having been taken out of presence of the trial court, by deposition, the presumption in support of findings based upon conflicting testimony in court does not prevail." *Rown v. Brake Testing Corporation* (C. A. 9), 38 F. 2d 220, 223-224.

To same effect, *Cf. Paraffine Companies v. McEverlast, Inc.* (C. A. 9) 84 F. 2d 335, 339.

> "The evidence was by deposition taken before a commissioner and we must sit in judgment on the facts, as if at *nisi prius* and arrive at a just conclusion without the aid of any presumption favoring the decision of the trial court on the issues presented." *Turnipseed v. Moseley,* 248 Ala. 340, 27 So. 2d 483, 170 A. L. R. 882.

Lastly, the trial court did not expressly or impliedly find that the Bruner testimony and opinions are true. The only findings which could be construed to have reference to

such testimony are Findings IV and XV. Finding IV reads:

> "That *during or about* the period above referred to, plaster in the buildings on the land of plaintiff shows evidence of cracking." (Emphasis supplied.)

Finding III discloses that the "period above referred to" was the period between October 2, 1951 and November 5, 1951 when the atomic explosions here under consideration occurred. Such finding is directly in line with the testimony of appellants witnesses and directly *contrary* to the testimony of Bruner which was to the effect that the cracks had occurred before the buildings were completed and continuously thereafter and that many of the cracks which he saw when he made his first and only visit to the premises in April, 1952, were *old* and were the result of temperature changes. It is also directly contrary to the temperature charts which are annexed to and a part of the Bruner deposition.

In Finding XV the court states, in part:

> "Upon the evidence before it, this court can not find that any officer or employee of the United States was negligent in the performance of his duties relating to atomic experimentation or that the atomic detonations were the proximate cause of the damage to plaintiff's property. The court finds that blast waves released from atomic detonation during the period in question may have reached the property of plaintiff on one or two occasions during the period involved * * *" [R. 29].

It is clear that the only portion of such part of Finding XV which could conceivably have reference to the issues presented by the Bruner testimony is:

> "* * * or that the atomic detonations were the proximate cause of the damage to plaintiff's property" [R. 29].

But, in view of the fact that the trial court had limited the period of time when the cracking in the plaster appeared to the period when the atomic blasts occurred [Finding IV in R. 25], it clearly appears that the trial court was *not* finding in line with or in affirmance of Bruner's concept that the cracking occurred at a much earlier time and from *temperature changes or settlement.*

2. The Jesionowski Case Supports Appellant's Contention That the Court Was in Error in Concluding That the Doctrine of Res Ipsa Loquitur Did Not Apply to This Case.

The trial court made no express finding or conclusion upon this issue but in footnote 1 to its memorandum of decision [R. 18] it held that the doctrine could not be applied because the evidence did not show that the "accident" is of such a nature that it ordinarily did not occur in the absence of negligence by the appellee. We have shown that this was reversible error (App. Br. 16-17) but the Government has replied that the *Jesionowski* case supports the trial court's conclusion (Gov. Br. 67). To the contrary, we believe that this decision squarely supports our contentions. In the *Jesionowski* case the trial court has instructed the jury upon the doctrine because

the evidence had eliminated any possibility that such control as was had by the plaintiff could have caused the damage of which the plaintiff complained. The First Circuit *reversed,* stating in part:

> "The thing that caused the injury could have been *Jesionowski's* fault, or it could have been the railroad's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur* * * *. Thus, an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case." *Boston & Maine Railroad v. Jesionowski* (C. A. 1), 154 F. 2d 703, 705.

Stopping here, we note that in our case in footnote 1 [R. 18] the trial judge determined that, since one of the elements of the rule is that the "accident" would not ordinarily occur in the absence of negligence by the defendant and since plaster cracking could occur from temperature changes and earthquakes, *even though the uncontradicted record is that both possibilities were eliminated* through the undisputed testimony of witnesses for appellant[1] the doctrine could not be applied. Thus, the trial court's reasoning is directly in line with the reasons and conclusions above expressed by the First Circuit.

---

[1]As to plaster cracking, *Cf.* discussion under point one, *supra*; as to no earthquake in that area during the time of these blasts [*Cf.* Millard, R. 115-116].

The Federal Supreme Court *reversed* this concept of the First Circuit stating:

> "We cannot agree. *Res ipsa loquitur,* thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, *even though it was proved that his operations of the things under his control did not cause the accident.*" (Emphasis supplied.)

It expressly found that the doctrine was properly applied by the trial court, stating:

> "Thus, the question here really is not whether the application of the rule fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that (the damage) was the result of defendant's negligence." (Insertion supplied.) *Jesionowski v. Boston & Maine Railroad,* 329 U. S. 452, 457.

We believe that the foregoing demonstrates that where, as here, other factors which might have affected the result have been eliminated by uncontradicted evidence, the Federal rule requires that the doctrine of *res ipsa loquitur* be applied, even though it would not have been applicable had such other possible causes not have been eliminated.

3. The Interpretation of the Discretionary Function Exemption (28 U. S. C., 2680 (a)) Which Is Discussed on Pages 18 to 24 of Appellant's Opening Brief Is Not Erroneous and Contrary to Dalehite.

We have shown in our Opening Brief (pp. 18-24) that the Fifth Circuit and the Eighth Circuit have concluded that:

> "If the Government, at the operational level, acts either contrary to the plan or in a manner not required by the plan, then the activity would not be discretionary and redress can be had for the resulting injury."

We quoted from and cited the opinion of the Eighth Circuit—*Dahlstrom v. United States,* 228 F. 2d 819, 821 and from the Fifth Circuit—*Fair v. United States,* 234 F. 2d 288, 294. Since our Opening Brief was prepared this concept has been accepted and adopted by the Sixth Circuit—*United States v. Pierce,* 235 F. 2d 466, which expressly adopted and approved the opinion of the District Court in *Pierce v. United States,* 142 Fed. Supp. 721, 730-733. We believe that these excellent and well reasoned opinions are sound and will be followed by this court.

But appellee constantly reiterates that such decisions are contrary to *Dalehite* (*Dalehite v. United States,* 346 U.S. 15) and page III of the index to the Government's Brief discloses that *Dalehite* has been referred to nineteen times therein. There are certain contentions made with respect to the *Dalehite* opinion which, we believe, are erroneous.

Appellee states that *Dalehite* did *not* limit the exception here under consideration to high level policy judgment

(Gov. Br. 55). We ask this court to note the following excerpt from *Dalehite* (p. 42) which is quoted by the District Judge in *Pierce v. United States,* at page 731:

> "The decisions held culpable were all responsibly made at a planning rather than operational level. * * *"

It thus appears that in *Dalehite,* irrespective of the breadth of its general language, the Supreme Court was considering and ruling upon alleged negligence arising out of decisions "made at *planning* rather than *operational* level." (Emphasis supplied.) It is elementary that:

> "* * * the language used in any opinion is to be understood in the light of the facts and the issue then before the court." *Eatwell v. Beck,* 41 Cal. 2d 128, 136, 257 P. 2d 643.

Appellee erroneously asserts that there is a close parallel between the *facts* in *Dalehite* and in this case (Gov. Br. footnote 31, p. 37). We submit that this concept is completely fallacious and that such fallacy is demonstrated by the following. In this case the trial court found that the shock waves from these atomic explosions were capable of extreme, erratic and uncontrollable destruction and property damage, and that similar tests had caused widespread damage [Pre-trial order, Par. 7, R. 13]. The court had further found that, as to each blast, the shock wave was uncontrollable and unpredictable under the existing circumstances [Finding XV, R. 29]. Appellant's Exhibits 31 and 34 are replete with official reported statements of the known intensity and dangerous character of the shock waves which experience had shown to be the results of such tests.

But in *Dalehite,* the Supreme Court stated (p. 42):

> "There must be knowledge of a danger, not merely possible but probable * * *. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now no one has suggested that the ignition of FGAN was anything but a complex result of the inner acting factors of mass, heat, pressure and composition."

It seems to the writer that it would be difficult to conceive of two cases in which the facts are so completely dissimilar.

Appellee asserts that the dissent in *Dalehite* was in basic agreement with the majority opinion. We disagree and illustrate such view with the following excerpts:

> "The Government insists that each act or omission upon which the charge of negligence is predicated—involved a conscious weighing of expediency against caution and was therefore within the immunity for discretionary acts provided by the Tort Claims Act" (p. 57).

> "The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down line there is immunity for every balancing of care against cost, of safety against production, of warning against silence" (p. 58).

Appellee asserts: (1) That governing bodies are not liable in tort for planning defects (Gov. Br. 22) and (2) that the government officials, themselves, cannot be held

liable (Gov. Br. 28-34). We make no such claims. Appellee further asserts (3) that appellant has failed to establish any departure or deviation from the plan (Gov. Br. 23, 43-47); (4) that the omissions of Dr. Cox were known to and concurred in by the Test Manager (Gov. Br. 24, 46) and were in the exercise of immune discretion (Gov. Br. 23, 47-53); that Dr. Cox gave several predictions of the probable blast pressure, only one of which was based on data obtained from the microbaragraphs (Gov. Br. 43, footnote 36 and p. 61) and (5) that it was the Test Manager and not Dr. Cox whom the appellant should have charged with negligence.

It would prolong this Reply Brief beyond permissible limits to detail and discuss all of the portions of the record which refute the foregoing assertions. We admit that the activities of Dr. Cox were known to and concurred in by the Test Manager but, as we have pointed out in our Opening Brief (App. Br. 11-12), the *plan* was to explode the bombs only when weather conditions were acceptable, the testing group had the means to make such determination and the authority to delay the explosions when such conditions did not exist. But the determination as to whether weather conditions "were, in fact, acceptable" could not be made in respect to areas which were 150 miles from the test site, except through the use of a microbaragraph located in that direction [R. 266, 267, 268, 272-273, 291]. Such being the case, this record discloses, not an immune exercise of discretion, but a total failure to do an act which was a necessary predicate to the exercise of discretion. Here Dr. Cox had failed to make *any test*

or graph whatsoever in one of the four principal directional points of the compass.

It is immaterial whether the other members of the test organization joined in such negligence because it is the government (which can only act through agents) which is the responsible party here. It is well settled that there is no requirement that appellant single out and identify the particular agent whose activities have created the government's liability. (*Pierce v. United States,* 142 Fed. Supp. 721, 733.)

While it is true that Dr. Cox gave other predictions as to probable blast pressure, his testimony clearly establishes that such predictions had and could have had no connection whatever with the effect of such pressures at a distance of 150 miles from the test site. We conclude by asking, if we accept the concept of appellee, where would one draw the line? If Cox, *et al.,* could, in the exercise of immune discretion and without departing or deviating from the plan completely omit microbaragraph tests toward one of the four major compass directions, could he have also exercised immune discretion and not so deviate if he determined to omit tests to the east and to the west; or to the south, east and west; or in all directions upon the assumption that the shock waves would not reach areas 150 miles distant? We think not, nor do we believe that this court will so hold. The simple and complete answer is that Cox was *not* exercising discretion but was negligently omitting an act which should have been done before he could exercise the *limited* discretion allowed to him. We

paraphrase the comment in *Somerset Seafood Co. v. United States* (C. A. 4), 193 F. 2d 631, 635, which reads:

> "There is certainly no discretion to mark a wreck in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger."

By stating:

> "There was certainly no discretion to omit entirely a necessary act which was the only means by which a test could have been made upon which discretion could have been exercised in conformity with the plan, in such way as to be wholly unable to decide whether or not the proposed detonations should be made or postponed."

And, as we have pointed out in our Opening Brief only *slight negligence* is required as a foundation for liability where the actor is engaged with explosive materials of the character here involved (App. Br. 10).

It is respectfully submitted that the judgment of the lower court should ~~reserve~~ be reversed *with directions* to enter judgment in favor of appellant and against appellee in the sum of $5,000.00 together with interest and costs.

Respectfully submitted,

Irl Davis Brett,

Attorney for Appellant.